BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LORRAINE M. FULTON
Claimant
VS.

CHERRY VILLAGE, INC.
Respondent
AND

USF&G COMPANY
Insurance Carrier
AND

SEDGWICK-JAMES
Insurance Carrier

Docket No. 166,252

ORDER

ON the 27th day of January, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge George R. Robertson dated January 4, 1994, came on before the Appeals Board for oral argument by telephone conference.

APPEARANCES

Claimant appeared by his attorney, John M. Russell of Great Bend, Kansas. Respondent, and insurance carrier, USF&G Company, appeared by their attorney, Richard L. Friedeman of Great Bend, Kansas. Respondent, and insurance carrier, Sedgwick-James, appeared by their attorney, Kirby A. Vernon of Wichita, Kansas. There were no other appearances.

RECORD

The record is herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge including the agreement between the two insurance carriers, USF&G Company and Sedgwick-James, to equally share the liability, if any, as to the award and cost of this claim.

ISSUES

(1) What is the nature and extent of claimant's disability?

(2) Is claimant entitled to future medical benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

(1) As a result of a personal injury by accident arising out of and in the course of claimant's employment with the respondent, Cherry Village, Inc., the ability of the claimant, Lorraine M. Fulton, to perform work in the open labor market has been reduced by sixty percent (60%) and her ability to earn comparable wages has been reduced by twenty-three percent (23%). Following the case of Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), the Appeals Board finds, pursuant to the facts and circumstances of this particular case, that both factors shall be given equal weight and therefore, finds and concludes that the claimant has suffered a forty-one and one-half percent (41.5%) permanent partial general work disability.

In October of 1988, the claimant started working for the respondent as a cook. Her job responsibilities included preparation of food for breakfast, lunch and supper for some 92 to 130 residents and employees of the respondent. Her job duties required her to stand on her feet for eight hours or more, repetitively using her hands, wrists and arms. The cook position required her to lift up to 50 pounds and to bend and twist repeatedly.

The claimant first started having pain and numbness in her thumb, wrist and first finger on her right hand in December of 1990. Eventually, she started having problems in her left hand, wrist and arm. Claimant's symptomatology increased in both upper extremities in 1991, including pain and discomfort in her left shoulder. Her hands would also swell and turn blue on occasion.

Finally, on May 13, 1992, after the claimant had prepared a meal of ham, beans and cornbread, her hands actually turned blue and she reported this problem to Doris Johansen, her dietary supervisor and part owner of Cherry Village, Inc. The respondent did not want the claimant's problems to be reported as a workers compensation matter. Accordingly, she was asked to seek medical treatment with her family physician, Merle Fieser, M.D., of Great Bend, Kansas. The respondent indicated that they would pay the medical bills out of their own pocket. Dr. Fieser diagnosed the claimant's problem as being bilateral carpal tunnel syndrome and had her return to work with braces on both wrists.

The claimant worked May 25, 1992 with the braces and her hands swelled to a point where she had to call another cook in to help her complete her shift. The next day, May 26, 1992, the respondent told the claimant to take off work because of her hand problem. This was the last day that the claimant worked for the respondent.

Dr. Fieser referred the claimant for treatment by Tyrone D. Artz, M.D., an orthopedic surgeon in Wichita, Kansas. Dr. Artz first saw the claimant on June 22, 1992 and diagnosed bilateral carpal tunnel syndrome. His recommended treatment was bilateral

carpal tunnel surgical releases. The left release was performed on July 24, 1992 and the right release was performed on August 14, 1992. Claimant continued to have increasing symptoms on the left which finally extended into her left shoulder and neck area. Dr. Artz treated the left shoulder with cortisone shots for a bursitis condition due to inactivity of the left shoulder following the carpal tunnel surgery.

Because of recurrent compression of the carpal tunnel in the left wrist, Dr. Artz performed another carpal tunnel release on November 2, 1992.

The last time the claimant was seen by Dr. Artz was March 16, 1993, when he released her for work with the following permanent restrictions:

a. Limit her repetitive hand movements to one-third of each day;
b. Return to a light to medium category of work;
c. Limit lifting to 30 pounds one-third of each day; and
d. Limit lifting from 10 to 20 pounds two-thirds of each day.

However, in a letter written to a nurse employed by the insurance company, two days after he released the claimant with the foregoing restrictions, Dr. Artz restricted the claimant to light to medium category of work with overhead lifting limit of 15 pounds one-third of each day and an overhead lifting limit of 5 to 10 pounds two-thirds of each day. Repetitive hand movements were limited to two-thirds of each day. Dr. Artz clarified that the additional overhead lifting limit was the result of the bursitis in the claimant's left shoulder. Dr. Artz further explained that the left shoulder overhead restrictions were probably temporary as the bursitis would most likely resolve in time with use of the arm and shoulder. The restrictions given on March 16, 1993 should be read together with the restrictions given on March 18, 1993, which included the overhead lifting restrictions attributable to the left shoulder.

With respect to permanent functional impairment rating, Dr. Artz opined that claimant had a five percent (5%) rating as to the right forearm which is a three percent (3%) of the right upper extremity, which is equivalent to two percent (2%) to the body as a whole as a result of her right carpal tunnel release. In reference to her left forearm, Dr. Artz rated her seven percent (7%) or five percent (5%) to the left upper extremity, which is equivalent to three percent (3%) to the body as a whole as a result of the left carpal tunnel release and recurrent release. Total permanent impairment to the body as a whole as a result of her bilateral carpal tunnel combined to five percent (5%) to the body as a whole.

It was Dr. Artz's further opinion that the work which the claimant was performing as a cook for the respondent aggravated a preexisting condition which caused the bilateral carpal tunnel injuries.

Claimant testified that she could not perform the work duties as a cook for the respondent within the restrictions established by Dr. Artz. She established that her left hand is almost useless as she cannot lift a gallon of milk without pain. Such pain goes up her arm to her left shoulder and into her neck. Her hands swell and turn colors worse on the left than on the right. Her left hand is worse than before the operation, however, her right has improved.

Claimant is 36-years of age with a ninth grade education. Her previous employment experience prior to working for the respondent consisted of babysitting, bartending, and taking care of her grandmother. On the date of the regular hearing on September 2, 1993, the claimant had not been employed since her last day of work with the respondent. She had applied for a number of jobs from a light cook assistant to a flower shop job. She was tested by and met with a vocational rehabilitation counselor during this period of time but she was denied any vocational rehabilitation benefits.

Jim Molski, vocational rehabilitation consultant, testified on behalf of the claimant concerning the loss of claimant's ability to perform work in the open labor market and to earn comparable wages. On June 9, 1993, Mr. Molski personally interviewed the claimant and reviewed medical reports of Dr. Artz which included the permanent and temporary restrictions Dr. Artz stated in the letter to the insurance company's nurse on March 18, 1993. Utilizing his education, personal experience and knowledge along with the Dictionary of Occupational Titles, Labor Market Access Plus 1992 computer program and data from the United States Census Bureau, he formulated his opinion on the claimant's loss of ability to perform work in the open labor market and earn comparable wages. Mr. Molski is of the opinion that the claimant's ability to perform work in the open labor market has been reduced in the range of fifty-five to sixty percent (55-60%) based on Dr. Artz's work restrictions. Mr. Molski also opined that the claimant's ability to perform work in the open labor market has been reduced by seventy-five to eighty percent (75-80%) based on additional complaints that the claimant related to him during the interview concerning her present ability to perform various physical tasks. In addition, using a pre-injury wage of $5.10 per hour compared to a post-injury minimum wage of $4.25 per hour to $4.75 per hour, the claimant has lost from seven to seventeen percent (7-17%) of her ability to earn comparable wages. Comparing the stipulated average weekly wage of $221.52 to a post-injury minimum weekly wage of $170.00 to $190.00, the claimant has lost fourteen to twenty-three percent (14-23%) of her ability to earn comparable wages.

The Administrative Law Judge found that the claimant had met her burden of proof in establishing work disability. A thirty-five percent (35%) work disability was awarded by the Administrative Law Judge utilizing Mr. Molski's range of figures for loss for claimant's loss of ability to perform work in the open labor market and loss of her ability to earn comparable wages.

Claimant argues that forty-three and one-half percent (43.5%) is the fair and reasonable work disability which has been established by the credible evidence in this case. He arrives at this work disability figure using the Hughes approach of averaging the low-range figure of seven percent (7%) for loss of comparable wage with the high-range figure of eighty percent (80%) for loss of ability to perform work in the open labor market.

It is the respondent's position that Mr. Molski's opinion as to claimant's loss of ability to perform work in the open labor market is based on erroneous assumptions. Mr. Molski based his opinions on Dr. Artz's restrictions which included temporary lifting restrictions to the left shoulder as a result of a temporary bursitis condition. Dr. Artz testified that such condition is only temporary and should probably resolve completely. In addition, respondent argues that Mr. Molski's analysis in reference to the claimant's loss of ability to earn comparable wages is flawed in that it compares pre-injury wage that includes overtime with post-injury wage without overtime. Because of these discrepancies, it is argued that the claimant has not met her burden of proof in reference to work disability and

therefore her award should be predicated entirely on Dr. Artz's functional disability rating of five percent (5%) to the body as a whole.

The respondent did not present evidence to contradict the claimant's testimony nor the testimony of the claimant's experts. Uncontradicted evidence which is not improbable or unreasonable and unless shown to be untrustworthy cannot be disregarded and should be ordinarily regarded as conclusive. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 380, 573 P.2d 1036 (1978).

The claimant's testimony at the regular hearing took place on September 3, 1993, and established that she continued to have pain in her left shoulder into her neck. Dr. Artz indicated that the overhead lifting restrictions that he imposed on March 18, 1993, were based on a flare-up of bursitis in the claimant's shoulder which should continue to improve and probably resolve completely. The claimant has established that the problem in her left shoulder has not resolved as of September 3, 1993, and therefore the overhead lifting limitations that were placed on the claimant in March of 1992 are still applicable. The Appeals Board finds that Mr. Molski's opinions in reference to the claimant's loss of ability to perform work in the open labor market are credible as they have been predicated on medical restrictions that should remain in force as the claimant's condition has not changed. Also, Mr. Molski's opinions in reference to wage loss are credible inasmuch as he compared post-injury wage with the average weekly wage stipulated to by all parties in this case. The procedure to follow in the computation of the claimant's gross average weekly wage is specifically set forth in K.S.A. 44-511. Overtime is specifically included in the calculation of the claimant's average gross weekly wage. The respondent argues that a fair comparison cannot be made between pre-injury wage and post-injury wage in this case, if pre-injury wage includes an amount for overtime. It is the respondent's contention that the only fair comparison that can be made is to take claimant's pre-injury wage without overtime and compare it with her post-injury wage without overtime. The Appeals Board finds that the claimant, in the instant case, has established through uncontradicted evidence that her average gross weekly wage contains an overtime amount and is her pre-injury wage for determining her loss of ability to earn comparable wages. She also has established through uncontradicted evidence that her post-injury wage does not contain overtime. In the face of uncontradicted evidence, the respondent has the responsibility to establish that the claimant has the ability to work overtime and further, whether jobs are available that she is capable of performing post-injury that provide overtime. In this particular case, the respondent has not presented such evidence and therefore, for wage comparison to show loss of comparable wage, claimant's pre-injury wage is her average gross weekly wage which includes overtime compared to a post-injury wage which does not include overtime.

The Appeals Board on a review of an award by an administrative law judge has the authority to increase or diminish an award of compensation. K.S.A. 44-551(b)(1). The Appeals Board finds and concludes that the claimant's work disability should be established based on the uncontradicted credible evidence presented by Jim Molski, a vocational rehabilitation consultant. It is the Appeals Board's finding that the most persuasive and reasonable evidence presented in this case is that the claimant's ability to perform work in the open labor market has been reduced by sixty percent (60%) and her ability to earn comparable wages has been reduced by twenty-three percent (23%). The Appeals Board, considering the whole evidentiary record, finds and concludes that both factors should be weighed and averaged equally and that claimant should be entitled to

a forty-one and one-half percent (41.5%) permanent partial general disability award based on work disability. Hughes, 247 Kan. at 422.

(2) The claimant is entitled to future medical benefits upon proper application to and approval by the Director.

The claimant in this case has testified that she has continuing discomfort and pain in both upper extremities as a result of her work connected injury.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson, dated January 4, 1994, is hereby modified and an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREIN ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Lorraine M. Fulton, and against the respondent, Cherry Village, Inc., and its insurance carriers, USF&G Company and Sedgwick-James, equally.

The claimant is entitled to 42.71 weeks of temporary total disability at the rate of $147.69 per week or $6,307.84 followed by 372.29 weeks at $61.29 per week or $22,817.65 for a forty-one and one-half percent (41.5%) permanent partial general bodily disability making a total award of $29,125.49.

As of March 24, 1994, there would be due and owing to the claimant 42.71 weeks of temporary total compensation at $147.69 per week in the sum of $6,307.84 plus 52.72 weeks permanent partial compensation at $61.29 per week in the sum of $3,231.21 for a total due and owing of $9,539.05 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of $19,586.44 shall be paid at $61.29 per week for 319.57 weeks or until further order of the Director.

The claimant is awarded unauthorized medical expense up to the $350.00 statutory maximum upon proper presentation of expenses.

Future medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

As per the stipulation entered into by USF&G Company and Sedgwick-James, insurance carriers, they have agreed to equally share all of the workers compensation benefits and court costs paid in this matter.

Fees necessary to defray the expense of administration of the Kansas Workers Compensation Act are assessed against respondent and its insurance carriers to be paid direct as follows:

UNDERWOOD & SHANE
Deposition of Lorraine Fulton
Dated July 1, 1992 $ 186.00
Transcript of Proceedings

Dated February 4, 1993		$ 84.55
	TOTAL	$ 270.55
OWENS BRAKE & ASSOCIATES		
Preliminary Hearing Transcript		
Dated July 7, 1992		$ 250.89
Regular Hearing Transcript		
Dated September 2, 1993		$ 435.35
	TOTAL	$ 686.24
COURT REPORTING SERVICE		
Deposition of Dr. Tyrone D. Artz		
Dated August 10, 1993		$ 163.05
Deposition of James T. Molski		
Dated August 10, 1993		$ 169.80
	TOTAL	$ 332.85

IT IS SO ORDERED.

Dated this _____ day of March, 1994.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: John M. Russell, 1121 Washington, Great Bend, Kansas 67530
Richard L. Friedeman, P.O. Box 1110, Great Bend, Kansas 67530
Kirby A. Vernon, 600 Epic Center, 301 North Main, Wichita, Kansas 67202
George R. Robertson, Administrative Law Judge
George Gomez, Director